Filed 3/29/19 In re I.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re I.S. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.S., Defendant and Appellant.	E071257 (Super.Ct.Nos. J272335 & J272336) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, Svetlana Kauper, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant C.S. (Mother) is the mother of S.J. (a girl, born Feb. 2012) and I.S. (a boy, born Aug. 2017). Mother appeals from the juvenile court's order summarily denying her Welfare and Institutions Code[1] section 388 petition. For the reasons set forth below, we affirm the court's denial of Mother's petition.

FACTUAL AND PROCEDURAL HISTORY

On August 15, 2017, San Bernardino County Department of Children and Family Services (CFS) responded to a referral alleging general neglect to I.S. Mother had been incarcerated since January 2017 for child molestation under Penal Code section 647.6, subdivision (a)(1). Shortly after she had given birth to I.S., Mother was transported back to state prison and nobody had come to take I.S. home from the hospital. The maternal grandmother (MGM) or maternal uncle (Uncle) was supposed to pick up I.S. from the hospital, but on the date of discharge, neither could get a ride.

On August 16, 2017, the social worker met with Uncle. Mother's five-year-old daughter S.J. was living with Uncle and MGM. Uncle's home was unkempt and disorganized. Numerous cockroaches were observed and flies were buzzing around the house. The social worker also found beer bottles and marijuana in the house. MGM was found sleeping on the floor on an inflated mattress next to S.J. Uncle explained that he had been caring for S.J. since Mother was incarcerated in January 2017; the whereabouts

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

of S.J.'s father were unknown.[2] Uncle reported that Mother had a history of drug use with the last use occurring prior to January 2017. He was unsure of Mother's drug of choice and how often she used. Uncle believed that Mother might suffer from mental health issues because of her erratic behaviors, but she had never been diagnosed with a mental illness.[3] Uncle advised the social worker the "plan" was that he would pick up I.S. from the hospital the following day, as he had secured a ride. However, the supplies for the newborn at the home included six used bottles, two boxes of oatmeal, four containers of baby food, one small can of powdered formula, 12 ready-to-use cans of formula, a small package of diapers, a car seat with a missing strap, a bassinet and a small trash bag of clothes. Throughout the interview with the social worker, Uncle drank from a "tall can" of beer. S.J. was detained due to risk of abuse or neglect.

On August 18, 2017, CFS filed petitions on behalf of S.J. and I.S. (collectively, the children) pursuant to section 300, subdivisions (b) and (g) for failure to provide, substance abuse, extensive criminal history and child left without supervision. The children were detained and placed in foster care; I.S. was placed with Ms. T., and S.J. was placed with Ms. P.

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[2] The father of S.J. was later determined to be in prison. He is not a party to this appeal. The father of I.S. was unknown.

[3] A nurse practitioner in the hospital reported that Mother's medical records included a diagnosis of bipolar disorder and post-traumatic stress disorder. It was unknown whether Mother was compliant with her medication.

The jurisdiction and disposition report filed September 11, 2017, recommended the juvenile court find the allegations true and to offer no reunification services to Mother.

S.J. and mother lived with MGM prior to moving in with Uncle. MGM told the social worker S.J. had lived with her since she was about a year old and that they went to live with Uncle when MGM had a stroke a few months earlier. Since the stroke, S.J. went "back and forth" between MGM's home and Uncle's apartment. MGM never sought legal guardianship of S.J. despite knowing Mother had a drug problem.

Police records dating from January 2016 to January 2017 showed that there were multiple calls to the police because Mother acted violently toward MGM, including one occasion where Mother grabbed MGM by her hair then hit MGM on the head five times—Mother had been released from jail that same day. Less than a month later, Mother threatened to stab MGM and drag her down the stairs; then proceeded to push MGM over a railing and wrapped her arm around MGM's neck. While MGM was partially over the railing Mother hit MGM in the face and head four to six times with a closed fist. Neighbors called police. Mother engaged in verbal altercations with MGM while exhibiting symptoms of being under the influence of a controlled substance. Mother's prior substance abuse involved child welfare investigations in Los Angeles County when S.J. tested positive for cocaine at her birth in 2012. Mother received treatment for her substance abuse in 2012 when the Los Angeles court ordered her to participate in family maintenance services for 10 months.

Between June 2015 and February 2016, Mother was arrested at least six times for being under the influence of a controlled substance. In addition to Mother's history of arrests related to substance abuse, she also had numerous arrests for assault, battery and theft. On February 22, 2017, she was convicted of assault with a deadly weapon with force and sentenced to three years in prison.

Mother was convicted of annoying/molesting a child under the age of 18 on April 14, 2017. The annoy/molesting conviction stemmed from Mother inappropriately touching her cousin's two daughters (ages six and nine) on their breasts, buttocks, inner and outside thighs, and vagina, while Mother was living at the cousin's home. Mother was required to register as a sex offender. Mother's cousin recalled Mother acting strange, and the things Mother said not making sense. Mother called MGM and S.J. wolves; she believed candles were to be used to kill her; she said Uncle had a twin sister that they killed; she talked on a wall phone that was not connected to a telephone line. Additionally, Mother carried a knife, an A-1 steak sauce bottle and glass cups around the house because she saw shadows and dead babies.

The social worker's report recommended that if reunification services were offered, they should include a substance abuse program, domestic violence and anger management counseling, mental health assessment, parenting classes and individual counseling.

Mother did not appear at the jurisdiction/disposition hearing held on October 18, 2017; she waived her right to be transported so as not to affect her participation in services while in custody. Mother's counsel argued that Mother had a strong relationship

with five-year-old S.J. Mother was very bonded to the children and her desire to be a good parent was evidenced by her participation in services while in custody. Mother was participating in substance abuse, anger management and parenting classes. Counsel concluded Mother's participation in services, as well as Mother's ability to keep the "family as a whole," when they were currently in separate foster homes, should be considered when determining the best interests of the children.

Counsel for CFS argued that offering Mother reunification services would not be in the best interests of the children. Mother had no relationship with I.S. and S.J. had been out Mother's care living with relatives due to Mother's incarceration and mental health issues. Counsel for the children reminded the court Mother was required to register as a sex offender and so was not entitled to services. S.J. spent the majority of her life out of Mother's care and I.S. was very young, so there was no evidence of a bond.

After hearing argument and reviewing the reports in evidence, the juvenile court adopted the findings, including an amendment to section 300, subdivision (b)(2), reflecting Mother exhibited erratic behavior. The court took into consideration the requirement that Mother register as a sex offender for the purposes of the bypass provision under section 361.5, subdivision (b)(16). No reunification services were granted and the court found it in the best interests of the children to consider termination of parental rights at the 366.26 hearing. Supervised letter and phone contact, if appropriate, was ordered while Mother was incarcerated; upon her release, the court ordered "supervised visits [a] minimum [of] one time a month for two hours." CFS was

ordered to prepare an adoption assessment as to I.S. The court set the 366.26 hearing for February 15, 2018, to determine a permanent plan for the children.

On November 3, 2017, Mother filed a notice of intent to file a writ petition challenging the setting of the section 366.26 hearing. On December 7, 2017, we dismissed Mother's writ petition after receiving a letter from Mother's counsel indicating there were "no legal or factual issues upon which to base an Extraordinary Writ."

The initial section 366.26 report recommended to maintain the children in a planned permanent living arrangement for six months until CFS located an adoptive home for both S.J. and I.S. At this time, the children remained in their respective foster homes. I.S. was maintained with Ms. T. S.J. continued to reside with Ms. P, who was willing and able to take legal guardianship of her; however, Ms. P. was unable to take I.S. CFS intended to find a single placement home for the children.

Mother was released from prison and on February 5, 2018, contacted CFS to set up visits. A visit was scheduled for February 14, 2018. Mother was out of custody and present at the initial selection and implementation hearing on February 15, 2018. Mother attended AA/NA meetings, and completed several programs while in custody, including a parenting class, counseling, and a substance abuse program. Mother lived in a sober living facility. The juvenile court ordered the visits between Mother and the children to remain supervised with the frequency of one time a month for two hours. The court granted CFS the authority to increase the frequency of visits if Mother were consistent and the visits went well.

At the August 15, 2018, post-permanency review hearing, CFS recommended to maintain the children under the current planned permanent living arrangement with the goal of adoption. I.S. remained in the foster home of the T. Family; he was attached to his caregivers and called them " 'Ma ma' and 'Da da.' " They were in the process of adopting a girl slightly older than I.S. so did not have room for S.J.; they felt the children should be adopted together. On June 14, 2018, S.J. was placed in the home of Ms. M. S.J. liked her new placement "very much." CFS considered several relatives and non-related extended family members for placement of the children, one of whom wanted placement of S.J.

As to the visits, Mother visited the children once a week for two hours, supervised by I.S.'s caregivers. Mother was dependable in attendance and appropriate during visits. Mother talked, played and danced with the children. After two of the visits, S.J. started to cry and wanted to go home with Mother. The social worker believed that a decrease in visits was appropriate to allow the children "to begin transition to a permanent plan of adoption." Based on Mother's consistent attendance, however, the juvenile court ordered Mother's visits to remain weekly. A further permanency planning review hearing was set for February 15, 2019.

On August 29, 2018, Mother filed a section 388 petition. Mother sought placement of the children. Alternatively, Mother sought family reunification services "so she can work on her goal of reunification." Mother also sought unsupervised visits. In support of her claim for changed circumstances, Mother attached certificates of completion for individual therapy, a self-care class, a parenting class, a substance abuse

class, anger management classes, and life skills. Mother also submitted seven negative drug test results. Mother stated it was in the best interests of the children to be placed together, "to get an opportunity to be raised . . . with their natural mother."

On August 29, 2018, the juvenile court denied Mother's petition for failure to state new evidence or changed circumstances and to promote the best interests of the children.

DISCUSSION

A. THE JUVENILE COURT PROPERLY DENIED MOTHER'S SECTION 388 PETITION

Mother argues that the juvenile court abused its discretion in denying her section 388 petition without a hearing because (1) "there is absolutely no question that Mother's circumstances had changed significantly" since the children's removal; and (2) Mother's bond during the supervised visitations with the children was "growing" and strengthening her relationship with the children.

Under section 388, a juvenile court order may be changed or set aside "if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*Ibid.*; § 388, subd. (d) ["If it appears that the best interests of the child . . . may be promoted by the proposed change of order, . . . the court shall order that a hearing be held"].) The prima facie requirement

is not met "unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*Zachary G.*, at p. 806.) We review the court's order denying a hearing for abuse of discretion. (*Id.* at p. 808.) "It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion**.**" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

In this case, Mother contends the juvenile court should have held a hearing on her section 388 petition because she established a prima facie showing of changed circumstances. Mother argues that her circumstances dramatically changed because she was no longer in custody, completed a substance abuse program, took a parenting class, and participated in individual counseling.

We need not decide whether the juvenile court erred in finding there was no prima facie showing of changed circumstances because Mother failed to make a prima facie showing that granting the section 388 petition, and placing the children in Mother's care, was in the children's best interest.

Parent and child share a fundamental interest in reuniting up to the point at which reunification efforts cease. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697, disapproved on another ground in *John v. Superior Court* (2016) 63 Cal.App.4th 91, 98-100.) At the point a section 366.26 hearing to select and implement a child's permanent plan is reached, however, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) Therefore, after reunification efforts have terminated or, as in this case, bypassed, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*In re Marilyn H.*

(1993) 5 Cal.4th 295, 309.) This is a difficult burden to meet when reunification services have been bypassed or terminated. This is because, "[a]fter the termination of reunification services [or bypass of services], a parent's interest in the care, custody and companionship of the child is no longer paramount." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464 (*Angel B.*).) In fact, there is a rebuttable presumption that continued foster care is in the child's best interest. (*Ibid.*) Such presumption applies with even greater strength when adoption is the permanent plan. (*Ibid.*)

At the time Mother filed her section 388 petition, almost 10 months after services were bypassed and six months after the initial 366.26 hearing, the children's interest in stability was the juvenile court's foremost concern, outweighing any interest in reunification. The prospect of allowing the children to be placed in Mother's care, or liberalizing visits to unsupervised, or providing Mother with reunification services to determine if Mother would and could do what she was required to do to regain custody, would not have promoted stability for the children, and thus would not have promoted the children's best interest. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 464.)

Mother claims that she was no longer in custody, completed individual therapy and a substance abuse program, attended parenting classes, received outpatient treatment, and learned anger management and life skills. The record in this case, however, shows that Mother had a long history of abusing drugs. In fact, Mother received treatment for her addiction in 2012 when she was participating in family maintenance in S.J.'s case. Notwithstanding the treatment she received, she relapsed and continued to use with increasing frequency in 2015 and 2016, when she was repeatedly arrested for being under

the influence. Mother has only just begun to make efforts to combat her long-standing drug program. Moreover, Mother was incarcerated for molesting two young children, ages six and nine, and there is nothing in the record to indicate that she received counseling and/or therapy to address sexual abuse of children. Instead, Mother learned "how to deal with [her] children on a timeline from birth until teenagers[,] how to get to know [her] children better[, and] how to parent in between time and during short visits." These classes did not address sexual abuse of children and how to avoid recidivism. With both I.S. and S.J. being young children and similar in age to Mother's two young victims, Mother's failure to address her past sexual abuse of young children is disturbing. Under such circumstances, the juvenile court could reasonably conclude that Mother had not made a prima facie showing of changed circumstances or that reinstating reunification services would promote stability for the children and be in their best interests. (*Angel B.*, *supra*, 97 Cal.App.4th at pp. 464-465.)

In *Angel B.*, *supra*, 97 Cal.App.4th 454, the appellate court rejected the mother's contention the juvenile court erred in denying her section 388 petition without holding a hearing. The mother in *Angel B.* had a long history of drug abuse, unsuccessful rehabilitation attempts, and failure to reunify with another child. After the mother was denied reunification services, she began to improve, enrolling in a treatment program, testing clean for four months, completing various classes, and obtaining employment. Regular visits with her child also went well. (*Id.* at p. 459.) Nevertheless, when she filed her section 388 petition for reunification services, the court summarily denied her petition

without a hearing. The appellate court affirmed, finding no abuse of discretion in the juvenile court refusing to hold a hearing. (*Id.* at p. 462.)

The appellate court in *Angel B.* acknowledged the petition showed the mother was doing well, "in the sense that she has remained sober, completed various classes, obtained employment, and visited regularly with [the child]." (*Angel B.*, *supra*, 97 Cal.App.4th at pp. 464-465.) The court also assumed for purposes of the appeal "that this time her resolve is different, and that she will, in fact, be able to remain sober, remain employed, become self-supporting and obtain housing." (*Id.* at p. 465.) Nevertheless, the court concluded that "such facts are not legally sufficient to require a hearing on her section 388 petition." (*Ibid.*) The court explained: "[T]here is a rebuttable presumption that, in the absence of continuing reunification services, stability in an existing placement is in the best interest of the child, particularly when such placement is leading to adoption by the long-term caretakers. [Citation.] To rebut that presumption, a parent must make some factual showing that the best interests of the child would be served by modification." (*Ibid.*) The mother in *Angel B.* did not make such a showing. Nor does Mother here.

In her section 388 petition, Mother stated that her children deserved "an opportunity to be raised together with their natural mother." Mother also argued that because "the children are currently placed in separate homes with no indication that adoption is currently an option," that "it would be in the best interest of the children to be placed together, with their mother who has worked extremely hard to be able to have an opportunity to reunify." Mother, however, fails to support her argument that placement

with her would be in the children's best interests. Mother's allegations are conclusory, not a factual showing that granting reunification services would promote the children's best interest. (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348-1349 ["allegations of her [section 388] petition were to be liberally construed, but conclusory claims are insufficient to require a hearing"].)

I.S. has no relationship with Mother, as he has been in foster care since his removal at birth. His only placement has been with the T. Family. I.S. was attached to his caregivers, calling them "Ma ma" and "Da da." Although the T. Family could not provide permanency for both the children, I.S.'s placement cannot be described as being in "limbo." Moreover, S.J. had been residing with an adult other than Mother—a relative or a foster mother—for most of her life. According to MGM, S.J. had lived with MGM since she was approximately a year old. Following Mother's most recent incarceration in February of 2017 until S.J.'s detention in August 2017, S.J. resided with either MGM or Uncle. During that time, S.J. went back and forth between the two homes. When S.J. entered foster care in August 2017, she was placed with Ms. P, who was willing to assume legal guardianship over S.J. On June 14, 2018, S.J. changed placements and her new foster parent was committed to S.J. and understood the trauma S.J. might have experienced. S.J. has been through two dependencies with Mother; she lived with Mother, MGM, Uncle and in two foster homes. To return her to Mother's care when Mother's situation is tenuous would further destabilize S.J. Furthermore, at the time of the section 388 petition, Mother had no appropriate home for the children. At the initial section 366.26 hearing, Mother resided in a sober living facility. Six months later,

Mother still had not addressed her living situation so she could have a place to reside with the children.

Based on the foregoing, the juvenile court did not abuse its discretion in denying Mother's section 388 petition without a hearing.

DISPOSITION

The juvenile court's order denying Mother's section 388 petition is affirmed.

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MILLER
Acting P. J.

We concur:

FIELDS
J.

MENETREZ
J.